

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE CHARLES NELSON COMPANY, APPEL-	} No. 287.
lant,	
v.	
THE UNITED STATES.	

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims dismissing the petition upon findings of fact made after trial of the issues. The plaintiff sued to recover the sum of \$20,321.33, the difference between the market value and the contract price of certain lumber furnished to the United States and claimed to be in excess of the amount required under its contract to be furnished to the United States (p. 6).

From the findings of the Court of Claims it appears that the plaintiff is a California corporation which maintained intimate business relations with the Crown Lumber Company, operating a mill in the State of Washington, and the Puget Sound Mills and Timber Company, operating a mill at Port Angeles,

Washington, and the relations between the companies were such that the plaintiff at times filled its orders by directing one of the companies named to furnish the required materials. A. A. Scott was a stockholder and the authorized agent of the plaintiff company and the manager of the Crown Lumber Company. (First finding, p. 17.)

On January 3, 1917, after due advertisement, formal competitive bids were opened by the Navy Department for furnishing and delivering fir lumber to the United States at the Puget Sound Navy Yard in such quantities and at such times during the period ending December 31, 1917, as the supply officer might direct. Plaintiff's bid being the lowest, it was accepted, and the plaintiff was awarded the contract. (Second finding, p. 17.)

On February 23, 1917, a formal contract in writing, known as Contract No. 28942, was entered into between the plaintiff and the Navy Department, a copy of which contract is attached to the petition as "Exhibit A" and is set forth in the record on pages 7 to 14. The contract was the usual form of contract used by the Navy Department for procuring supplies during a given period, and the plaintiff in previous years had procured, entered into, and performed similar contracts. (Third finding, p. 17.)

This contract contained the following clause (p. 8):

It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quan-

tities of Douglas fir which may be ordered for the naval service at the place named during the period ending Dec. 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for.

The amount mentioned in the classification made part of the contract was 1,675,000 feet board measure "(about)" (p. 8).

About the time of the execution of the contract the plaintiff, on one of its usual order forms, directed the Crown Lumber Company to furnish 1,675,000 feet board measure of Douglas fir as the same might be ordered from time to time by the supply officer at the Puget Sound Navy Yard, and the supply officer was notified that A. A. Scott, General Manager of the Crown Lumber Company, was the authorized representative of the plaintiff company in the matter of furnishing the lumber under its contract. Thereafter, the supply officer at the Navy Yard from time to time transmitted orders for lumber to the Crown Lumber Company which were filled and the invoices therefor were signed by the Charles Nelson Company by A. A. Scott, its agent. (Fourth finding, pp. 17 and 18.)

By May 21, 1917, the Crown Lumber Company had delivered approximately 950,000 feet and received and accepted orders in addition thereto for the delivery of 1,186,000 feet. On May 17 the Commandant of the Navy Yard wired the plaintiff that he was withholding orders for approximately 130,000

feet of lumber on account of congestion at the Crown Lumber Mill, stating that delivery was desired by June 1 and asking if the plaintiff could arrange to furnish this and future urgent orders under the contract from other mills until the situation at the Crown Lumber Company was relieved, to which the plaintiff replied asking the Commandant to confer with Mr. Scott, and the next day it wrote:

Immediately on receipt of your telegram we wired Mr. A. A. Scott, general manager of the Puget Sound Mills & Timber Co., Port Angeles, to do everything he possibly could to furnish the orders you are withholding, as also other business that he may have on his books for the department. Would be pleased to have you confer with Mr. Scott relative this business.

The orders referred to and the orders theretofore received and the quantity of lumber delivered exceeded 1,675,000 feet, and the plaintiff, up to this time, had made no protest against filling orders in excess of that quantity. Delays in deliveries, pleas for indulgence, and means of expediting the filling of orders were the subjects of correspondence. On May 21, 1917, the Crown Lumber Company, by A. A. Scott, Manager, wrote the supply officer at the Navy Yard, calling attention to the provision of the contract for 1,675,000 feet and stating that there was due on the contract in addition to the amounts delivered only 725,000 feet, "so that you will have to recall approximately 461 M of these orders which you have sent us, as we can not apply them against

this contract, for we can not exceed the amount of the original contract, viz, 1,675 M feet. Would kindly ask you to advise us what proportion of these orders which we now have unfilled on our books that you wish to withdraw." On May 22 the supply officer replied to this letter, quoting from the plaintiff's contract the provision which we have already set forth, and saying: "Your request, therefore, will not be complied with, inasmuch as the contractor, the Charles Nelson Company, is bound to deliver any quantity of lumber which may be ordered under this contract as per terms mentioned above," and further stating that a copy of the letter was being furnished to the Charles Nelson Company with the request that the situation be relieved by removing from the Crown Company's hands orders covering sufficient lumber to insure prompt delivery under all orders outstanding.

When the letter of May 21 was written by Mr. Scott he did not know of the provision in plaintiff's contract, and claims no knowledge of that provision prior to September 25, 1917 (p. 19). On May 23 the supply officer at the Navy Yard wired the plaintiff that the Crown Lumber Company and the Puget Sound Company had declined to fill orders for approximately 300,000 feet and that unless immediate arrangements were made to effect delivery by June 10 it would be "necessary to purchase in open market against your account." On June 2 the supply officer, addressing the Crown Lumber Company and forwarding an order under the contract for 287,940 feet, said:

This order is submitted in accordance with telephone conversation of Mr. A. A. Scott, of the Puget Sound Mill and Timber Company, of Port Angeles. It is understood from Mr. Scott that the delivery conditions specified above could be complied with, but if for any reason it is not possible to make deliveries as specified you will please notify this office by return mail in order that steps may be taken to procure the lumber in the open market.

On June 7, 1917, acknowledging this order, the Crown Lumber Company, "by A. A. Scott, vice pres. & genl. manager," said: "We are accepting this order under protest, especially as to delivery date." Order No. 7, dated June 5, was on June 11 accepted by the Crown Lumber Company by A. A. Scott, manager, "under protest;" order No. 8, of June 21, was, on June 26, over the same signature, accepted "under protest, especially as to delivery;" and order No. 9, of June 28, was on July 2, over the same signature, accepted "under protest, especially as to delivery." On June 18, 1917, the *plaintiff company* wrote the supply officer at some length, and the letter is set forth in the fifth finding of fact on page 20.

This letter refers to a letter from the supply officer transmitting instructions received from the Navy Department at Washington, authorizing purchase "as requested" if the contractor failed to make delivery. In this letter the plaintiff states that it has never been its intention or aim to fail to make de-

livery, and that Mr. Scott had been instructed to give the defendant's business the right of way; that its vice president had been "on the Sound" recently and stated that at both mills nothing was left undone to produce the lumber ordered under the contract. It further goes on to state that when the plaintiff entered into the contract it never dreamt that it would be expected to deliver extraordinary quantities of clear lumber of long lengths within the time limits specified, and that it felt that it was entitled to some consideration and a little leniency. It also sets forth that if the defendant should buy this lumber in the open market "you probably would penalize us \$10 per M." The writer expresses himself as feeling that plaintiff was not responsible for the extraordinary conditions and concludes: "We are not asking to be relieved of any responsibility, but rather we submit the facts with a view of enlisting your cooperation to assist us in completing our engagements." (Fifth finding, pp. 20 and 21.)

In June, 1917, Mr. Scott had a conference with officers at the Navy Yard, brought about by the apparent inability of the contractor to deliver lumber as rapidly as needed and for the purpose of urging action. During this conference *Mr. Scott* protested against being required to deliver more than 1,675,000 feet at the contract price, but the representatives of the Government maintained that the matter was governed by the contract and no promise of any kind was made to pay more than the contract price.

The Court of Claims finds:

Large quantities of lumber were thereafter delivered on orders theretofore and thereafter placed under the contract. No protest against furnishing more than 1,675,000 feet of lumber under the contract was ever made by the plaintiff company itself or any of its officers, and it does not appear that Mr. Scott was directed to make such a protest at the conference above referred to or that he was acting within his authority in so doing.

The plaintiff company furnished to the defendant, on orders placed by the defendant under Contract 28942, 3,688,259 feet of lumber, for which it was paid at the contract price, and it did not at the time of any payment make to the United States any protest against payment at that price, and so far as the United States was informed such payments were accepted as in full. (Seventh finding, p. 21.)

ARGUMENT.

I.

The findings by the Court of Claims seem to render any extended discussion of the case unnecessary. These findings show that at one time a difference of opinion arose between the Government officers and Mr. Scott with respect to the meaning of the contract between the appellant and the United States, Mr. Scott claiming that the obligation assumed by the appellant was fulfilled by furnishing 1,675,000 feet of lumber, while the Government

claimed that under the clause of the contract hereinbefore quoted the contractor was obligated to furnish any quantity "which may be ordered for the naval service at the place named during the period ending December 31, 1917, irrespective of the estimated quantity named." The naval officers insisted that their interpretation was right and threatened to purchase lumber in the market against the contract if the contractor refused to perform. It appears that Mr. Scott at this time did not know of that provision of the contract, and he seems to have had in mind the order placed with the Crown Lumber Company by the contractor about the time the formal contract was executed, which order to his company was for 1,675,000 feet, and his protest seems to have been based upon that and not upon knowledge of the terms of the contract with the appellant. The Court of Claims says in its opinion, "It must be assumed that he was interpreting the contract liability of the plaintiff by the terms of the order issued to the Crown Lumber Company of which he was manager." Thereafter he accepted orders indicating that the acceptance was under protest, in most cases "especially as to delivery date," and, as the Court of Claims says, delivery dates seem to have been more a subject of controversy than anything else (p. 23). But while Mr. Scott was doing this, the plaintiff itself, although informed of Scott's attitude, made no such contention, but on June 18, 1917, wrote to the supply

officer the letter set forth in finding 5, to which we have referred, which seems clearly to be a repudiation of Scott's position and an assertion by the appellant itself of its willingness to furnish all the lumber ordered. This letter is not a protest against furnishing lumber but an explanation why there had been some delay, with the request that the Department exercise forbearance, inasmuch as the appellant was doing its best under "extraordinary conditions" for which it was not responsible. There is no claim whatsoever in this letter that the appellant is not required to fill any of the orders given by the supply officer, and, as the Court of Claims has found, no protest against furnishing it was ever made by the plaintiff company itself or any of its officers. At any rate all the orders were accepted and filled without further protest, and the lumber was paid for at the contract price. No protest was made at the time of payment and, so far as the United States was informed, such payments were accepted in full. If the plaintiff's obligation under its contract was in effect to furnish 1,675,000 feet of lumber, and no more, it would have been entirely within its rights, having furnished that amount, to refuse to furnish more, and having furnished additional quantities in compliance with orders specifically predicated on the contract, and after accepting payment therefor at the contract price without protest, it can not now recover additional compensation therefor.

II.

In appellant's brief it is claimed under the first point that the contract was void for mutuality and that the appellant could terminate it upon notice at any time. A sufficient answer to this is that the appellant did not elect so to do. It is therefore unnecessary to consider what its rights might have been.

The appellant argues under the second point of its brief that the purpose for which the lumber above the estimated amount was used was not covered by the contract and therefore was not within the contemplation of the parties within the time of the execution thereof, but what has already been said is an answer to this contention. If the appellant was not bound to furnish this lumber under the contract it should have refused to do so, or at least saved the point in some legal manner. Its position was clearly one of acquiescence. Its letter of June 18, 1907, already referred to and set forth in the fifth finding of fact on page 20, makes this perfectly plain. There is in this letter no claim whatever that it was not obligated to furnish the lumber required, and so far from being an assertion of any such claim it is rather an admission thereof, coupled with a courteous and conciliatory explanation of delays, and request, not that it be relieved from filling the orders, but that it be given reasonable time under the circumstances so to do.

There was none of the elements of duress or unfairness in the attitude of the naval officers of the kind involved in the case of *Freund v. United States*, decided by this court November 13, 1922, and referred to in plaintiff's brief, and if the construction placed upon the contract by the naval officers was incorrect, it was adopted without further protest by the appellant. The most that was done by the supply officer was to send a telegram to the appellant that the subsidiary companies had declined to fill orders and that "unless immediate arrangements are made to effect delivery by June 10 it will be necessary to purchase in open market against your account" (p. 19). The whole controversy seems to have been between the supply officer and Mr. Scott, for as soon as the situation was brought to the attention of the appellant itself, it wrote the letter of June 18, 1917, already referred to, saying among other things that Mr. Scott had been instructed to give "your business the right of way," and that appellant's vice president had been "on the Sound recently, and he states that at both mills nothing is left undone in order to produce the lumber that you have ordered under the contract." Surely this can not be such compulsion, coercion, duress, or by whatever name it may be described as made involuntary the acts of the appellant thereafter in furnishing the lumber and accepting payment without protest, and entitled it to sue upon an implied promise to pay more. If the appellant had supported Mr. Scott and notified the supply officer that it claimed that it had already complied with its con-

tract and refused to furnish any more at the contract price, there would be some force to the contention; but as soon as Mr. Scott's principal, the contractor and appellant herein, learned of what had taken place, it in effect repudiated the position taken by Mr. Scott and thereafter proceeded to furnish the lumber and accept the contract price therefor in full, and the Court of Claims finds, as a fact, that so far as the United States is informed, the payments were accepted in full (p. 21). That court says, in its opinion, that if the plaintiff accepted these payments as partial payments only, "the proof goes no further than to indicate either an unexpressed mental reservation or an afterthought." It is respectfully submitted that unexpressed mental reservations and afterthoughts do not furnish causes of action against the United States.

CONCLUSION.

Whatever may have been the true construction of the contract, the appellant having accepted the construction placed upon it by the officers of the Government, having complied with this construction and received pay in full without protest or reservation, the judgment of the Court of Claims should be affirmed.

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JANUARY, 1923.